

Petition for writ of mandate filed 9/25/97. Writ granted. Appealed to court of appeal 12/3/98. 1/6/00 Petition for review pending. Appellate court reinstated our decision. Supreme Court denied review.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by)	SPB Case No. 96-0210/39414
)	
MING C. LIU)	BOARD DECISION
)	(Precedential)
From dismissal from the position of)	
Associate Programmer Analyst with the)	NO. 97-02
Employment Development Department)	
at Sacramento)	April 8, 1997

APPEARANCES: Nancy T. Yamada, Attorney, California State Employees Association, on behalf of appellant, Ming C. Liu; David E. Paulsen, Staff Counsel III, Employment Development Department, on behalf of respondent

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members

The general rule is that an appointing power must serve an adverse action within three years of the charged misconduct. If an action is based on fraud, however, the appointing power has three years from the date of discovery to serve the adverse action unless, with the exercise of due diligence, the appointing power should have discovered the fraud earlier.

More than three years after appellant filed two employment applications that omitted the fact that appellant had been previously been rejected during probation, the Department dismissed appellant for fraud in securing his appointment and dishonesty. Had the Department investigated the accuracy of appellant's applications at the time they were submitted, it would have discovered the omissions. Thus, the preliminary issue before the State Personnel Board is whether the Department's failure to investigate constituted a lack

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of due diligence such that the adverse action should be considered time-barred. If the action is not time-barred, the Board must also decide whether the facts support appellant's dismissal.

In this decision, the Board concludes that due diligence did not require the Department to test the truth of every statement in an employment application when nothing in the application or in the interview process put the Department on notice that the application was not truthful or complete. The Board also finds that appellant knowingly omitted his previous rejection during probation from his application, conduct that constituted fraud in securing his appointment and dishonesty and justifies appellant's dismissal from state service.

BACKGROUND

Procedural Summary

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal by Ming C. Liu (Appellant) from dismissal from the position of Associate Programmer Analyst with the Employment Development Department at Sacramento. Although the Board did not limit the parties' right to argue other matters, the Board specifically requested argument on the issue of whether the adverse action was taken within the statutory time limits set forth in Government Code § 19685, as interpreted in the Board's precedential decision Steven Perez.¹²

¹(1996) SPB Dec. No. 96-09

After a review of the record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board finds that the adverse action was taken within the statutory limits and sustains appellant's dismissal for the reasons stated below.

FACTUAL SUMMARY

Employment History

In 1983, the Department of Veteran Affairs (DVA) appointed appellant to a permanent civil service position as a Programmer. On December 12, 1984, the Department of Transportation (Caltrans) appointed appellant to a position as a Programmer. On April 22, 1985, Caltrans rejected appellant during his probationary period and appellant returned to DVA. On November 16, 1992, appellant applied for and was appointed to the position of Programmer II at the Employment Development Department (Department or EDD). On November 8, 1993, appellant applied for, and was appointed to, the position of Associate Programmer Analyst at EDD.

In February of 1996, as part of a review of appellant's performance record, the Department discovered that appellant had previously been employed by Caltrans, that appellant had been rejected during his probationary period while at Caltrans and that, in both his 1992 and 1993 applications, appellant failed to disclose his employment at Caltrans. On March 19, 1996, the Department dismissed appellant on grounds that he misrepresented his employment history in the application process.

1992 Application and Hiring Process

On October 19, 1992, appellant submitted an Application for Examination to the Department for the position of Programmer II. Question 2.e of the application asks:

WERE YOU EVER DISCHARGED, REJECTED DURING PROBATION, OR HAVE YOU EVER BEEN REQUESTED TO RESIGN OR RESIGNED UNDER UNFAVORABLE CIRCUMSTANCES FROM ANY EMPLOYMENT?

The applicant is also informed:

YOU MAY OMIT ANY INCIDENT OCCURRING OVER SEVEN YEARS AGO EXCEPT A DISCIPLINARY OR PUNITIVE DISMISSAL, OR A PROBATIONARY PERIOD REJECTION FROM CALIFORNIA STATE CIVIL SERVICE.

If the answer to any of the questions is 'Yes', the applicant is instructed to provide details in item #10 of the application.

Appellant's response to Question 2.e was to mark "No." Appellant did not provide any information in item #10.

Question 14, which requests a candidate's work history, states:

BEGIN WITH YOUR MOST RECENT EXPERIENCE. LIST ALL EXPERIENCE IN THE LAST SEVEN YEARS, INCLUDING U. S. MILITARY SERVICE. GIVE DETAILS OF THE EXPERIENCE WHICH YOU BELIEVE MEETS THE ENTRANCE REQUIREMENTS FOR THIS EXAMINATION. GO BACK MORE THAN SEVEN YEARS IF NECESSARY. (Emphasis in original).

Appellant did not complete Question 14 on the form provided but, instead, attached a resume. Appellant's resume included his experience as a Programmer at DVA and his experience prior to state service at the Glendale Savings and Loan Association, but did not list his work experience as a Programmer at Caltrans.

Item #11 of the application states in pertinent part:

CERTIFICATION OF APPLICANT - READ CAREFULLY BEFORE SIGNING
I HEREBY CERTIFY, That all statements made in this application are true and complete.

Item 11 also provides a signature and date block. Appellant signed and dated the application where indicated.

As part of the hiring process, appellant was interviewed by a panel of three managers, including Susan Farrar who appeared as a witness in this case. During the interview, appellant was not asked and did not disclose that he had been rejected during probation by Caltrans. Appellant was appointed to the position of Programmer II on November 16, 1992.

Farrar testified that, had she known appellant had been rejected during probation, she and the other panel members would not have automatically disqualified him. Farrar would, however, have closely questioned him about the reasons for his rejection. Thus, Farrar relied on the information provided by appellant in determining whether to question him further. At the hearing, Farrar's concern was not appellant's earlier rejection but her perception that appellant had misrepresented his employment history.

1993 Application and Promotion

On February 19, 1993, appellant submitted another Application for Examination, this time for promotion to the position of Associate Programmer Analyst (Specialist). On this application, appellant again answered "No" to Question 2.e and did not fill out item #10 on the application. In connection with his experience, appellant answered Question 14, which requests a description of all work experience in the last seven years, by noting that he had been an employee of the Department from 1992 to the present and that he had worked for the DVA from 1983 until November of 1992. Appellant also indicated that he had held a number of positions going back to 1978, although for three of the positions he did not list a start and end date. Appellant also attached a resume to this application which included descriptions of the various positions he had listed on the application. Appellant did not note

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in the application or in his resume that he had been employed by Caltrans from December 1984 to April 1985.

At item #11, the Certification, appellant signed and dated the application, signifying that the information was true and complete.

Farrar was appellant's supervisor. In March of 1993, she prepared a favorable Promotional Readiness Report on behalf of appellant. As part of the process, Farrar reviewed appellant's 1993 application for promotion. Farrar recommended that appellant be promoted. Appellant was promoted to Associate Programmer Analyst in November of 1993.

Discovery that Rejection During Probation Was Omitted

In February 1996, Jefferson Phillips McCann, an Associate Personnel Analyst, performed a review of appellant's personnel file to determine if there was any indication of a performance problem. The file did not contain any information about appellant's rejection during probation while employed at Caltrans. McCann checked appellant's employment history with the State Controller's Office and discovered that appellant had been employed by Caltrans and rejected during probation while there.

Based on McCann's discovery that appellant had failed to disclose that he had been employed and then rejected by Caltrans, the Department dismissed appellant from his position.

Appellant's Testimony

At the hearing before the ALJ, the appellant acknowledged that the text of Question 2.e required him to disclose any "probationary period rejection from California State

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Service." Appellant claimed, however, not to have read that phrase as applicable to him. Appellant testified that he was not rejected from California State Service, he was rejected from Caltrans and was returned to his previous civil service position at DVA. As he put it, he still had his state civil service "card."

Appellant also testified that his rejection should not be considered a rejection. Appellant testified that his ears had become sensitive because of an on-duty industrial accident in which a machine fell through the floor. After the accident, appellant's location in the computer room was too noisy for him. Appellant filed a grievance requesting that he be reassigned to another location or rejected for medical reasons and returned to his previous position at DVA.

In a letter dated April 2, 1985, Caltrans partially granted his grievance and rejected him during probation. Caltrans did not, however, reject appellant for medical reasons as requested. Caltrans rejected appellant for his reluctance to work in the computer room. The letter explained that he could not be transferred because there were no Programmer positions in any other Caltrans location.

Appellant testified that, when he received the Caltrans letter, he disagreed with much of its content. Appellant crossed out the sections of the text with which he disagreed and submitted the letter back to Caltrans personnel office. Appellant was rejected and returned to his former position at DVA.

In the Notice of Adverse Action, the Department alleged that appellant intentionally failed to disclose his previous rejection during probation on two applications, conduct which

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the Department alleged constituted cause for discipline pursuant to Government Code section 19572, subdivisions (a) fraud in securing appointment and (f) dishonesty.

DISCUSSION

Timeliness of Adverse Action

Government Code § 19635 provides that disciplinary action must be taken against an employee within three years after the cause for discipline arises.

If the action is based on fraud, embezzlement or falsification of records, the time limit expires three years from the date of discovery of the misconduct.³ The Board has held, however, that the "fraud exception" does not apply if the Board determines that, by exercising due diligence, the department should have discovered the fraud within the statutory time limit.⁴

In the present case, the applications omitting the rejection during probation were submitted in October of 1992 and February of 1993. The Department did not take action until March of 1996. Thus, the three year statute of limitations had run and, unless the "fraud" exception applies, the action must be dismissed.

The Department asserts that it did not discover appellant's omission until February of 1996 when the analyst assigned to review appellant's personnel file accessed the State Controller's files and found that appellant had been rejected during probation and did not include this information on his employment applications. The Department took action one month after discovery of the omission.

Appellant argues that, since the Department had the capability in 1992 and 1993 to discover appellant's omission by searching either the Controller's Office files or SPB files

³Government Code section 19635

⁴Perez, 96-09 at p.12.

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but failed to do so, the Department failed to exercise due diligence in discovering the fraud and cannot take advantage of the fraud exception to the three year rule. We disagree.

While we think it sound practice for a department to check State Controller's Office or SPB records prior to making a job offer, we do not believe that Government Code section 19635 places an affirmative obligation upon a Department to independently investigate the truth of every statement made in the application process or risk being forever barred from taking action based on fraud. Here, the Department had no indication that appellant's resume and work history were anything but trustworthy statements of appellant's work experience. Appellant signed a certification to the effect that his answers were true and complete. The Department is entitled to rely on representations by an applicant as to the truth of the statements in the application. We find no evidence that the Department failed to exercise due diligence in the application process or that it should have discovered appellant's omission sooner.

Fraud in Securing Appointment/ Dishonesty

Appellant also argues that the Department failed to prove that he engaged in fraud to secure his appointments or that he was dishonest. Again, we disagree.

Appellant does not contest that he failed to disclose his rejection during probation. He claims, however, that he did not have any intent to mislead the Department. He testified that his rejection from Caltrans should have been on medical grounds and not on performance grounds and presented evidence that he disagreed with and protested Caltrans' decision to reject him during probation for reasons of performance rather than for medical reasons. Thus, while appellant's testimony may evoke sympathy for his position, it

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also demonstrates that he was well aware that a rejection during probation could tend to discredit his work history.

Appellant also claimed to have misunderstood Question 2.e. He claims to have read 2.e to require that he disclose his rejection only if it resulted in his being completely removed from state service and not merely from one Department. The ALJ who heard the testimony of the witnesses and was able to judge their credibility found that appellant did not misunderstand the text of the application but, instead, purposely omitted information about his rejection during probation. This finding is consistent with the above finding that appellant knew that a rejection from Caltrans would discredit his employment history, even though it would not affect his ability to return to DVA.

Also consistent with the finding that appellant was purposely concealing his employment at Caltrans is the fact that both of appellant's resumes excluded the Caltrans employment. In appellant's 1993 application, he indicated that he had remained at DVA for the entire time between 1983 when he was first appointed until 1992 when he was hired by EDD. Thus, appellant misrepresented the length of his employment at DVA by excluding his 5 month stint at Caltrans.

In this same application, appellant went back as far as 1978 to disclose state and private positions which would support his candidacy for the Associate Programmer Analyst position. Including these earlier, less relevant programming jobs magnifies the omission of the more relevant Caltrans employment.

In addition, the "Certification," which appellant was instructed to read carefully and sign, put appellant on notice that his answers were expected to be "true and complete."

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The totality of the evidence indicates that appellant intentionally concealed his rejection during probation.

Ironically, appellant's supervisor Farrar testified that, had appellant listed his rejection, this fact would not have automatically disqualified him from employment with the Department. Instead, she would have closely questioned him about the circumstances. Farrar's testimony highlights the Department's position in this case. The issue was not whether appellant had been rejected during probation but whether he dishonestly concealed information.

The Department demonstrated by a preponderance of evidence that appellant was dishonest in filling out the 1992 and 1993 applications. The Department also demonstrated that the hiring panels reasonably relied on the truth of appellant's application in not questioning him concerning his rejection. Thus, appellant's omission constitutes both fraud in securing his appointment and dishonesty, pursuant to Government Code § 19572, subdivisions (a) and (f).

Penalty

When performing its constitutional responsibility to review disciplinary actions⁵, the Board is charged with rendering a decision that is "just and proper".⁶ To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers

⁵ Cal. Const. Art. VII, section 3(a).

⁶ Government Code § 19582

are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly)⁷ as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.⁸

In two separate hiring processes, appellant concealed that he had been rejected during probation, thereby misrepresenting his work history. This repeated misrepresentation prevented the evaluating panels from being able to examine appellant's work history in comparison to other, more honest applicants. Although we cannot say, under the circumstances of this case, that appellant would not have been hired by the Department, we do believe that the Department should have been given all the information upon which it generally relies in making hiring decisions. Because appellant's intentional failure to disclose his previous rejection during probation deprived the Department of information necessary to make a conscientious hiring decision, dismissal is appropriate.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The dismissal taken against appellant, Ming Liu, is sustained.
2. This decision is certified for publication as a Precedential Decision.

⁷ (1975) 15 Cal.3d 194

⁸ *Id.* at 217-218.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 8, 1997.

C. Lance Barnett, Ph. D.
Executive Officer
State Personnel Board